

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENZEL ARTHUR SIMMONS,

Defendant-Appellant.

UNPUBLISHED

September 16, 2014

No. 316426

Wayne Circuit Court

LC No. 12-007320-FC

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to murder (AWIM), MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, assault with a dangerous weapon (felonious assault), MCL 750.82, and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84. He was sentenced to 20 to 40 years' imprisonment for the AWIM conviction, two years' imprisonment for the felony-firearm conviction, one to four years' imprisonment for the felonious assault conviction, and 6 to 10 years' imprisonment for the AWIGBH conviction. He appeals as of right. Because the evidence was sufficient to support his convictions and he was not entitled to have a jury decide the facts related to determining the recommend minimum sentencing range under the Legislative guidelines, we affirm.

This case arises from a shooting that occurred in Detroit, Michigan on July 13, 2012. The day before, on July 12, 2012, Daniel Torres assaulted a teenage girl when she attempted to prevent him from providing alcohol to her sister. She in turn told her brother, Wilson Gee, one of the victims in this case, about the incident, prompting Gee to fight Torres that evening.

The following day, Gee heard that Torres had been walking by his house and making threats. Believing there would be another fight, Gee, accompanied by three or four friends, met Torres, defendant, and a third individual, known as "Little One," outside a nearby store. Gee and Torres had a verbal altercation, after which Gee's group walked away from the store. As the group walked away, Gee looked back and saw Torres pass a silver object to defendant. In comparison, one of the individuals in Gee's group, Enijah Lamb, stated that he saw a pistol on defendant's waist before the shooting began. In either case, someone in Gee's group yelled out that there was a gun, and they all began running. Gee saw defendant point the gun and fire

several shots at the group. Others confirmed that defendant fired numerous shots. Gee, the only member of his group to be shot, was hit twice in the back.

In a statement to police after his arrest, defendant acknowledged his presence at the scene of the shooting, but he denied firing any shots. He maintained that Torres gave him the gun, but that he passed it back to Torres and then ran away while Torres fired the gun at Gee's group. The jury convicted defendant of AWIM and felonious assault in relation to Gee, AWIGBH in relation to Lamb, and felony-firearm. Defendant now appeals as of right.

On appeal, defendant first argues that the prosecution presented insufficient evidence to support his convictions for AWIM and felonious assault. Specifically, defendant argues that the prosecution failed to prove beyond a reasonable doubt that defendant possessed the requisite intent to murder, so that his AWIM conviction must be vacated. Further, defendant argues that his conviction for felonious assault was inconsistent with his AWIM conviction because those crimes contain different, mutually exclusive levels of intent. He maintains these inconsistent verdicts cannot both stand and, in relation to this argument, questions whether two such convictions violate prohibitions against double jeopardy.

We review a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court analyzes whether the evidence, viewed in a light most favorable to the prosecution, could allow a rational trier of fact to determine that the essential elements of the crime charged were proved beyond a reasonable doubt. *Id.* We resolve any conflicts in the evidence in favor of the prosecution. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

AWIM is a specific intent crime, the elements of which are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The intent to kill may be inferred from any facts in evidence, including the defendant's conduct and injuries suffered by the victim. See *People v Ericksen*, 288 Mich App 192, 196-197; 793 NW2d 120 (2010). Given the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to prove intent. *Id.* at 197.

In this case, the prosecution clearly presented sufficient evidence to establish that defendant possessed the actual intent to kill Gee. In the moments before the shooting, defendant was outside the store with Torres, during Torres's verbal confrontation with Gee. Defendant either accepted a gun from Torres, or brought a gun to the scene. Then, as Gee's group walked away, defendant fired several shots at Gee and his group, hitting Gee twice. Defendant's intent could be inferred from his conduct, specifically evidence that he used a lethal weapon to fire numerous gunshots into Gee's group, and in fact succeeded in shooting Gee twice in the back. Such evidence clearly demonstrated that defendant acted with the requisite actual intent to kill.

In regard to defendant's felonious assault conviction, pursuant to MCL 750.82(1), "a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great

bodily harm less than murder” is guilty of felonious assault. “The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Though defendant labels his argument regarding his felonious assault conviction as a challenge to the sufficiency of the evidence, defendant does not actually contest whether the prosecution presented sufficient evidence to establish these elements.¹ Rather, defendant maintains that the jury could not find defendant guilty of AWIM, which requires actual intent to kill, while at the same time finding defendant guilty, on the basis of the same conduct, of felonious assault, which is, by statute, an assault committed “without intending to commit murder.” Because of this purported inconsistency, defendant maintains the two convictions are mutually exclusive and his felonious assault conviction cannot stand along with a conviction for AWIM based on the same conduct.

To the extent defendant’s argument questions the consistency of the jury’s verdict, his argument is without merit because it is well-recognized that inconsistent verdicts within a single jury trial do not require reversal. *People v Wilson*, 496 Mich 91, ___; ___ NW2d ___ (Docket No. 146480, June 18, 2014); slip op at 6. “[J]uries are not held to any rules of logic nor are they required to explain their decisions.” *Id.*, quoting *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Because juries are not required to return consistent verdicts, defendant is not entitled to relief on this basis.

Insofar as defendant’s argument regarding convictions for both felonious assault and AWIM raises double jeopardy concerns, those concerns were not included in his question presented, meaning those arguments need not be considered. See MCL 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). In any event, contrary to defendant’s arguments, convictions for both felonious assault and AWIM do not violate double jeopardy. In particular, prohibitions against double jeopardy ensure that no person will “be subject for the same offense to be twice put in jeopardy” US Const Am V; Const 1963, art 1, § 15. This includes protection against multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). Where our Legislature has not clearly expressed its intention to authorize multiple punishments for the same conduct, Michigan Courts apply the “same elements” test to determine whether multiple punishments are permitted. *Id.* at 316. Under that test, offenses are analyzed to determine if each offense requires proof of a fact that the other offense does not. *Id.* at 302-304, 318-319.

Felonious assault requires the use of a dangerous weapon and an intent to injure or place the victim in reasonable apprehension of an immediate battery, neither of which are required for AWIM; in contrast, AWIM involves an actual intent to kill, which is not required for felonious

¹ Clearly, the elements of felonious assault were proven beyond a reasonable doubt. Defendant shot at Gee with a gun, i.e., a dangerous weapon identified in MCL 750.82(1). As evidenced by his actions, defendant clearly intended to hurt Gee or place him in reasonable apprehension of being shot. Accordingly, there was sufficient evidence for a reasonable jury to convict defendant of felonious assault.

assault. See *Brown*, 267 Mich App at 147; *Avant*, 235 Mich App at 505. Because AWIM and felonious assault each require proof of an element that the other does not, defendant's convictions for both AWIM and felonious assault do not violate double jeopardy protections against multiple punishments and his double jeopardy argument must fail. See *Smith*, 478 Mich at 304, 319.

Defendant next argues that he is entitled to resentencing because the trial court engaged in impermissible fact-finding to determine his minimum sentences in violation of his Sixth and Fourteenth Amendment rights. Specifically, defendant contends that only facts found by the jury should have been used by the trial court in determining his minimum sentences.

Defendant's argument is premised on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and a related line of cases, including, most recently, *Alleyne v United States*, ___ US ___, 133 S Ct 2151; 186 L Ed 2d 314 (2013). In general terms, these cases recognize that facts increasing the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. See *Blakely*, 542 US at 301. More recently, in *Alleyne*, the Supreme Court extended this principle to require that fact-finding used to establish a *mandatory* minimum sentence must also be conducted by the jury. *Alleyne*, 133 S Ct at 2162-2163.

It is well-established that the principles discussed in *Blakely* did not impact Michigan's indeterminate sentencing scheme, pursuant to which judicial fact-finding is undertaken for the purpose of establishing the minimum sentence, while the maximum sentence imposed on the basis of the jury's verdict is established by statute. See *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006). Defendant recognizes the holding in *Drohan*, but argues its reasoning is inapplicable following *Alleyne*, which considered judicial fact-finding related to the imposition of a mandatory minimum sentence.

However, as defendant concedes, this Court has already considered the implications of *Alleyne*, and again concluded that Michigan's indeterminate sentencing scheme remains unaffected because our system involves judicial fact-finding to arrive at a recommended sentencing range which informs the trial court's discretion to sentence within the maximum allowed by the statute and the jury's verdict. *People v Herron*, 303 Mich App 392, 403; 845 NW2d 533 (2013). Michigan does not, in other words, impose a *mandatory* minimum on the basis of judicial fact-finding, meaning that "the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment right to a jury trial." *Id.* at 403-404. See also *Alleyne*, 133 S Ct at 2163 ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.").

Given this Court's decision in *Herron*, defendant's argument regarding the necessity of additional fact-finding by the jury is without merit and he is not entitled to resentencing. Because the decision in *Herron* is binding precedent, MCR 7.215(C)(2), defendant is not entitled to resentencing.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood